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SUPREME COURT OF THE UNITED

OCTOBER TERM, 1938

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No. 177

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J. S. KOHN, M. S. KOHN AND J. W. KOHN, ADMINISTRA-  
TOR OF THE ESTATE OF CARRIE KOHN, DECEASED,  
*Appellants,*

*vs.*

CENTRAL DISTRIBUTING CO., INC., AND THE COM-  
MONWEALTH OF KENTUCKY, ETC., ET AL.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF KENTUCKY.

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## STATEMENT AS TO JURISDICTION.

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HARVEY H. SMITH,  
WILLIAM A. SCHUBERTH,  
HENRY J. COOK,  
*Counsel for Appellants.*



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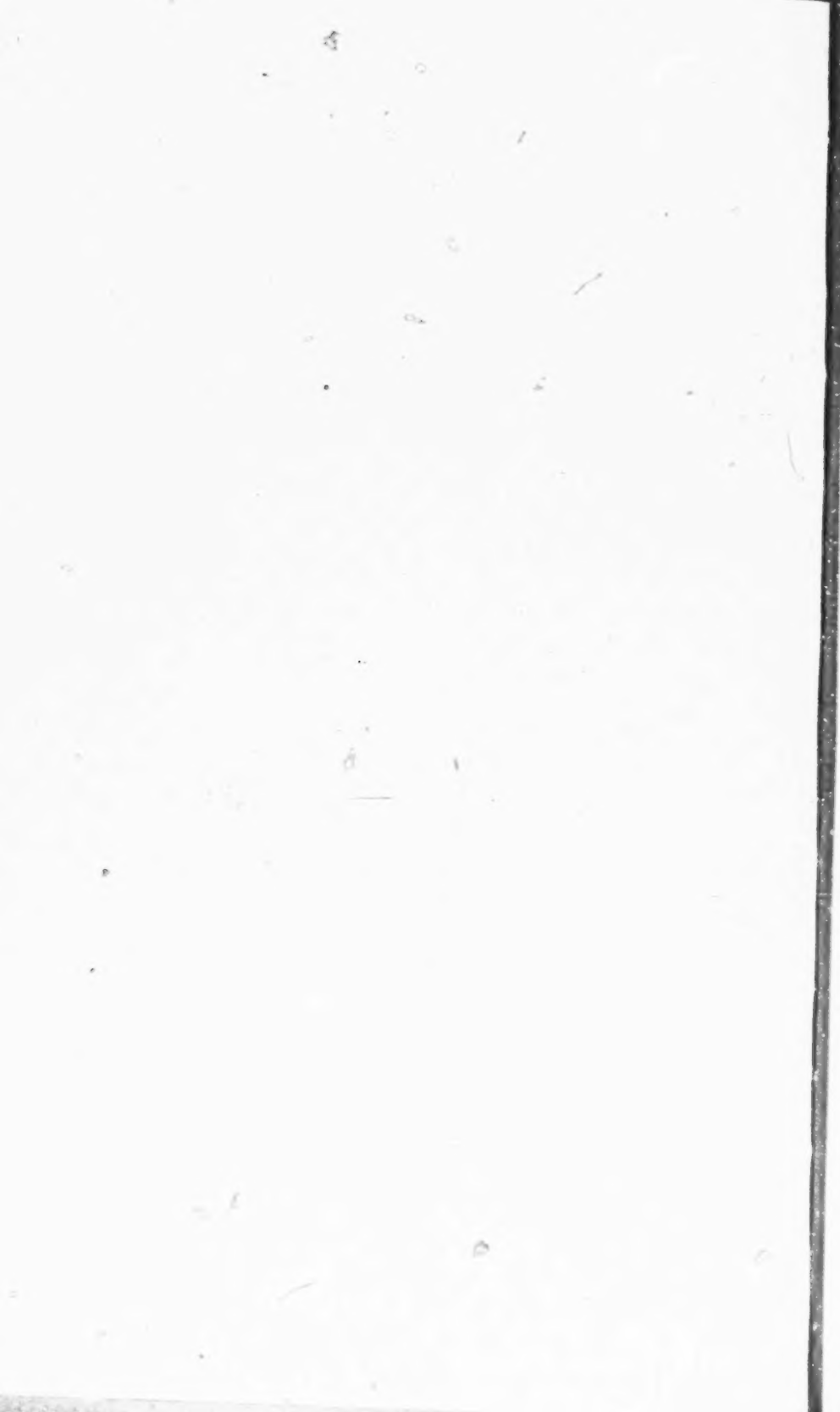
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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No. 177

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J. W. KOHN, M. S. KOHN, ET AL.,

*Appellants,*

*vs.*

CENTRAL DISTRIBUTING COMPANY, INC.; J. W. MARTIN, REVENUE COMMISSIONER OF KENTUCKY; STATE OF KENTUCKY; L. C. SICKMIER, SHERIFF, CAMPBELL COUNTY,

*Appellees.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM  
THE EASTERN DISTRICT OF KENTUCKY.

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**APPELLANTS' STATEMENT OF GROUNDS FOR  
JURISDICTION ON APPEAL AND SUPPORTING  
AUTHORITIES.**

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*To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:*

The above appellants and each of them, in support of the jurisdiction of the Supreme Court of the United States:

to review the above entitled cause, and the final judgment and decree therein, on appeal, and particularly disclosing the grounds therefor, respectfully represent:

(a) In accordance with paragraph I of Rule 12 of the rules of the Supreme Court of the United States, the Appellants hereby suggest the jurisdiction of this Honorable Court to be Section 380 of Title 28 of the Code of the United States, and Section 266 of the Judicial Code, amended. This Section of the Code being based on the alleged unconstitutionality of State statutes, wherein the appellants are injured by the enforcement of laws of the State of Kentucky believed to be a violation of the Constitution of said State, and repugnant to the 14th Amendment of the Constitution of the United States and Section 8 of Article one thereof. And wherein appeal is authorized from the ruling of a three-judge ruling in respect of a temporary and permanent injunction (Section 266 of the Judicial Code, as amended by Act of February, 1925, C. 229, Section I, 43 Statutes 938). And especially that portion of said section which reads as follows:

“An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case; and taken from a final decree granting or denying a permanent injunction in such suit.”

That the statutes of Kentucky involved, and as we believe invalid, are the “Kentucky Alcoholic Control Act and the Whiskey Tax Law”, of said State, all of which are set out in Exhibit A, attached to this statement, and the “Kentucky Alcoholic Beverage Tax Law”, marked Exhibit B. And the Alcoholic Beverage Control Law, enacted March 7, 1938, by the General Assembly of Kentucky, being H. B. 129.



(b) That there is also involved a construction of Section 8, Article one of the Constitution of the United States and Amendment 14 of the United States Constitution; and 976 of the Kentucky Statutes, relating to the jurisdiction of the Franklin Circuit Court of Franklin County, Kentucky, and Section 59 of the Constitution of Kentucky.

(c) That there is also involved Section 41, Title 28 of the United States Commerce Laws (U. S. C. A.) 8-23. There is also involved Sections 171, 172, 174, 181 and 182, and Sections 109, 3 and 19 of the Constitution of the State of Kentucky, which is attached, marked Exhibit C; and also Section 63 of the Civil Code of Practice of the State of Kentucky.

That the date of the final decree and judgment sought to be reviewed, is April 16, 1938, of three judges, and the date upon which this application for appeal was made and presented herein was on the same date, on which appeal was allowed by the three-judge court.

(d) That the nature of the above entitled case was an application for an injunction by the appellants against J. W. Martin, Revenue Agent of the State of Kentucky, and the State of Kentucky *et al.*, to restrain said State officials from enforcing the tax Act and other provisions of the laws hereinbefore referred to, and restrain said officials from seizing certain alcoholic beverages, owned by petitioner's licensee, Central Distributing Company, Inc., on which appellants held a mortgage for more than \$3,000, and to prevent revoking their licensee's permit which would have destroyed their licensee's business and their security.

(e) That appellees on or about the 15th day of January, 1938, seized by attachment process approximately \$5,000 of merchandise on which your appellants held a first lien mortgage under the laws of Kentucky.

That the amount in controversy is approximately \$4,500, claimed in taxes by the State of Kentucky, and about \$3,500 due to these appellants, and about twenty-one thousand dollars overpaid in taxes by your appellant's licensee, Central Distributing Company, which claim is assigned to these appellants, and therefore the amount in controversy is, exclusive of interest and costs three thousand dollars and over. The said appellants at all times being citizens of Ohio and the appellees, citizens and corporation of Kentucky.

That said Alcoholic Act of Kentucky of 1934 is void, and the tax provision of the Act of 1936 is repugnant to the Constitution of the State of Kentucky, Sections 171, 172, 174, 181, 182 and the import provision for import tax of five cents per gallon on whiskey under the Act of 1936, is a violation of Section 8 of Article One of the Constitution of the United States; and the said Act of 1934 under which charges were made against appellants' licensee for non-payment of said taxes is repealed, and the Act of March 7, 1938, enacted after the said suit was brought against Central Distributing Company and the said appellees are seeking to give that Act *ex post* and retroactive force, contrary to Section 19 of the Constitution of Kentucky and the decisions of its courts.

As to the jurisdiction of the Franklin Circuit Court, the following sections of the Statutes of Kentucky, its Code of Practice and the decisions thereunder, your appellants believe, sustain the grounds which will support the jurisdiction of this Court.

Sec. 63, Carroll's Code of Practice of Kentucky;  
 Section 976 of the Compiled laws of Kentucky;  
 Section 59, 126, 19, 109 and 3 of the Constitution of  
 Kentucky;  
*James v. Helm*, 129 Kentucky 239;

*Commonwealth v. Grand Central Building and Loan*,  
30 S. W., at page 628;  
*Commonwealth v. Long*, 30 S. W., page 629;  
Sections 171, 172, 174, 181, 182 of the Constitution of  
Kentucky.

As to the jurisdiction of this Court we think the following  
decisions sustain appellants contention:

*Claybrook v. City of Owensboro*, 16 Fed. 297;  
*Ward v. Flood*, 48 California 51;  
*Corson v. Maryland*, 120 U. S. 489;  
*Asher v. Texas*, 128 U. S. 129;  
*Ex parte Virginia*, 100 U. S. 339;  
*Shepherd v. Johnson*, 2 Humphrey 285;  
*Ex parte Young*, 209 U. S. 123;  
*In re Rahrer*, 140 U. S. 545;  
*Scott v. Donald*, 165 U. S. 58;  
*Walling v. Michigan*, 116 U. S. 446;  
*J. and A. Frieberg v. Dawson*, 274 Fed. 255;  
*Dawson v. Kentucky Distilleries*, 255 U. S. 288;  
*Field Packing Co. v. Glenn*, 5 Fed. Supp. 4;  
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*Shinkle v. City of Covington*, 129 Kentucky 368;  
*Lemke v. Farmers Loan and Grain Company*, 255 U. S.,  
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*Coe v. Errol*, 116 U. S. 517;  
*Baldwin v. Selig Co.*, 294 U. S. 516;  
*Sherman v. Grinnell*, 123 U. S. 679;  
*McCormick v. Brown*, 286 U. S. 131;  
*Dugan v. Bridges*, 16 Supp. 634;  
*Pacific Produce Company v. Martin*, 16 Fed. Supp. 34;  
*Rhodes v. Iowa*, 170 U. S. 412.

A copy of the judgment of the three-judge court is set forth as Exhibit F.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of the Section 380, Title 28 of the U. S. Code, annotated, and Section 266 of the Judicial Code as Amended, and the Constitution of the United States, Article 3, Section 2, thereof.

Respectfully submitted,

HARVEY H. SMITH,  
 WILLIAM A. SCHUBERTH,  
 HENRY J. COOK,  
 Counsel for Appellants.

## EXHIBIT "A".

### Carroll's Kentucky Codes.

SEC. 63. *Fine or forfeiture to recover; officer against.*—Actions must be brought in the county where the cause of action, or some part thereof, arose.—

1. *Fine, penalty, or forfeiture to recover.*—For the recovery of a fine, penalty, or forfeiture, imposed by a statute; but if the offense for which the claim is made be committed on a water-course or road which is the boundary of two counties, the action may be brought in either of them.

2. *Public officer; against.*—Against a public officer for an act done by him in virtue or under color of his office, or for a neglect of duty.

3. *Action on official bond.*—Upon the official bond of a public officer.

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## EXHIBIT "B".

### Carroll's Kentucky Statutes.

SEC. 976. *Franklin circuit court; jurisdiction in Commonwealth cases.*—The Franklin circuit shall have jurisdiction, in behalf of the Commonwealth, of all causes, suits and motions against clerks of courts, collectors of public money, and all public debtors or defaulters, and others claiming under them; and for this purpose its jurisdiction shall be co-extensive with the state.

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## EXHIBIT "C".

### Constitution of Kentucky.

SEC. 171. *Levy and collection of taxes by general laws; public purposes only; uniform within the class and terri-*

*tory; classification of property; bonds of state and its divisions exempt; referendum of laws classifying property; provisions for.*—The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

The general assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.

Any law passed or enacted by the general assembly pursuant to the provisions of or under this amendment or amended section of the constitution, classifying property and providing a lower rate of taxation on personal property, tangible or intangible, than upon real estate, shall be subject to the referendum power of the people, which is hereby declared to exist to apply only to this section, or amended section. The referendum may be demanded by the people against one or more items, sections or parts of any act enacted pursuant to or under the power granted by this amendment, or amended section. The referendum petition shall be filed with the secretary of state not more than four months after the final adjournment of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people under this section. All elections on measures referred to the people under this act shall be at the regular general election, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become a law when approved by the majority of the votes cast thereon, and not otherwise. The whole number of votes cast for the candidates for governor at the regular election last preceding the filing of any petition shall be the basis upon which the legal voters necessary to sign such petition

shall be counted. The power of the referendum shall be ordered by the legislative assembly at any time any acts or bills are enacted, pursuant to the power granted under this section or amended section, prior to the year of one thousand nine hundred and seventeen. After that time, the power of the referendum may be ordered either by the petition signed by five per cent (5%) of the legal voters or by the legislative assembly at the time said acts or bills are enacted. The general assembly enacting the bill shall provide a way by which the act shall be submitted to the people. The filing of a referendum petition against one or more items, sections or parts of an act shall not delay the remainder of that act from becoming operative. (Amended November, 1915.)

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### **EXHIBIT "D".**

#### **IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.**

J. W. KOHN, M. S. KOHN, and J. W. KOHN, Administrator of  
the Estate of Carrie Kohn, *Petitioners*,

*v.*

CENTRAL DISTRIBUTING COMPANY, INC., 45 E. 11th Street,  
Newport, Kentucky, and the COMMONWEALTH OF KEN-  
TUCKY, by and on the relation of James W. Martin, Com-  
missioner of Revenue, and L. C. Sickmier, Sheriff of  
Campbell County, Kentucky.

#### **Order and Judgment of the Court.**

This cause coming on for hearing before the Honorables  
Elwood Hamilton, United States Circuit Judge, John D.  
Martin, United States District Judge, and Mac Swinford,  
United States District Judge, on the motion of the petition-  
ers for a temporary and permanent injunction, and the peti-  
tioners being present by counsel H. H. Smith and Henry  
Cook, and respondents being present by counsel J. J. Leary  
and William Hayes, Assistant Attorney General for the



Commonwealth of Kentucky; and the Court being fully advised, it is ordered, adjudged and decreed that the temporary and permanent injunction of petitioners be denied, and the motion of petitioners for said injunction be and is hereby over-ruled; and the petitions of the petitioners are dismissed, to all of which petitioners object and except.

It being the opinion of the court that the legislative act of 1934, entitled "Kentucky Alcohol Control Act", furnishes petitioners an adequate remedy in Section Twelve (12) of said Act to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky under said Act.

Petitioners, by their counsel, announced that they wished to appeal to the Supreme Court of the United States from the judgment, order and decree of this Court, and give notice in open court to that effect; which appeal is now granted and allowed by the Court.

Enter: This 16th day of April, 1938.

ELWOOD HAMILTON,  
*United States Circuit Judge.*

JOHN D. MARTIN,  
*United States District Judge.*

MAC SWINFORD,  
*United States District Judge.*



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